IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 1013

KELLEY, GLOVER & VALE, INC., J. J. KELLEY, W. J. GLOVER, JR., and MILO F. VALE,
Petitioners,

vs.

ELMER W. HEITMAN, Receiver of First National Bank of Gary, Indiana, and WILLIAM S. RITMAN, Successor Receiver of said bank,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA.

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TABLE OF CONTENTS.

TABLE OF CASES CITED.

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MAY IT PLEASE THE COURT:

STATEMENT OF MATTER INVOLVED.

Petitioners complain that the Indiana Supreme Court arbitrarily discriminated against them, contrary to the equal protection clause of the Fourteenth Amendment.

Petitioners won an important decision in the Indiana Appellate Court against respondent. (R. 82, 91; 40 N. E.

(2d) 409.) This decision was final in about the same sense that a federal Circuit Court of Appeals' decision is final. No right of appeal exists from the Appellate Court to the Indiana Supreme Court, but respondent's only recourse was to petition the latter court to transfer the case to itself upon two narrow, specific statutory grounds. The prevailing party in the Appellate Court then has the absolute right to answer the petition within ten days, showing why the statutory grounds for transfer do not exist and why the Supreme Court should not grant the petition to transfer the case. If the petition is successfully resisted, the Appellate Court's decision remains absolutely final. But if the petition is granted, the Appellate Court's decision is *ipso facto* vacated and destroyed, and the entire case is opened for review in the Supreme Court. Thus, in effect, the petition to transfer is quite analogous to a petition to this Court for certiorari to review a Circuit Court of Appeals' decision.

Respondent, after losing the Appellate Court's decision, filed his petition in the Indiana Supreme Court to transfer the case (R. 98). *That court then arbitrarily refused to let Your petitioners exercise their statutory right to answer the petition or to show why the petition should not be granted.* Seven days after the petition was filed, the court granted the transfer (R. 102), without receiving any answer from Your petitioners and without giving them their statutory ten days in which to file same. They then petitioned the court to vacate the transfer order and permit them to file their answer (R. 102), which the court refused without citing any ground (R. 105).

Thereafter the court decided against Your petitioners directly opposite to what the Appellate Court had decided (R. 105; 44 N. E. (2d) 981), though there was a strong dissenting opinion by the Chief Justice in their favor (R. 110; 44 N. E. (2d) 985; not yet officially reported).

Petitioners submit to this Court that the Indiana Supreme Court's refusal to let them answer constitutes arbitrary favoritism to the respondent national bank receiver, and arbitrary discrimination against them. It is not a question of construing the law, which is statutory and unmistakable, but of discrimination against these particular litigants, contrary to the equal protection clause of the Fourteenth Amendment. No attempt was made by the Indiana Supreme Court to construe the law as not entitling them to answer, nor to hold them in any default or blame so as to forfeit their right to answer. The court arbitrarily denied them the benefit of the law and gave no excuse.

It is the same thing as if this Court should grant a petition for certiorari less than twenty days after it was filed, without receiving any opposing brief, and then arbitrarily deny the respondent's right given him in Rule 38 to file a brief. Such arbitrary favoritism would never be indulged in by this Court, and petitioners submit that it should not be tolerated on the part of a state supreme court.

A further grievance asserted by petitioners is that after the Indiana Supreme Court transferred the case to itself as above set forth, it proceeded to deny them due process of law and equal protection of the law in deciding the merits of the case, in the following respects:

A. The decision imposes an unlawful and unusual requirement upon petitioners which is not imposed by Indiana law on other similiar litigants, namely that these petitioners must obtain from the trial court the statement of a *conclusion* of law in the trial court's *findings*. For failure to meet this unusual and unlawful requirement, the Indiana Supreme Court decided against petitioners (R.

107, 108). See Proposition IIA, *infra,* under "Reasons for Allowance of Writ."

B. The Indiana Supreme Court's decision is based upon non-existent facts stated in the majority opinion, contrary to the uncontradicted facts in the record which are set forth in the dissenting opinion of the Chief Justice (R. 112-116) and which, if stated in the majority opinion would entitle petitioners to judgment under the Indiana law admitted in the majority opinion. See Proposition IIB, *infra,* under "Reasons for Allowance of Writ."

BASIS OF THIS COURT'S JURISDICTION.

Jurisdiction is based upon *Judicial Code, Sec. 237, amended* (*Title 28, Sec. 344; R. S. Secs. 690, 709*) which enables this Court to review the highest court of a state in cases:

> "where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution"

which petitioners did in the Indiana Supreme Court (R. 119), said court being the highest court in Indiana in which a decision could be had (Art. 7, Secs. 1-4, Indiana Constitution).

Petitioners contend that the Indiana Supreme Court has discriminated against them and denied them equal protection of Indiana law and deprived them of property without due process of law, contrary to the *Fourteenth Amendment of the Constitution of the United States,* in the following respects:

THE QUESTIONS PRESENTED.

All questions relate to *discrimination* against petitioners by the Indiana Supreme Court in violation of the equal protection and due process clause of the Fourteenth Amendment, to-wit:

I.

Did the Indiana Supreme Court *discriminate* against petitioners by denying them the right granted by law to all similar Indiana litigants to be heard in opposition to the transfer of a case to that court from the Appellate Court for review?

II.

After transferring the case to itself, did the Indiana Supreme Court *discriminate* against petitioners on the merits of the case in the following respects:

A. Did the court impose an unlawful and unusual requirement on petitioners, (namely, that they must have a conclusion of law stated in the findings) and then decide against petitioners for failure to meet this requirement which is not imposed by Indiana law on other litigants?

B. Did the court base its decision on non-existent facts stated in the opinion contrary to the uncontradicted record facts set forth in the Chief Justice's dissenting opinion? While this Court will not ordinarily review questions of fact found by the highest court of a state, it will do so where the facts stated by such court as the basis of its decision are non-existent and contrary to all the record. In the latter case the question ceases to be one of fact and becomes constitutional.

Fisk v. *State of Kansas*, 274 U. S. 380, 385 (bottom); 71 L. Ed. 1104; 47 S. Ct. 655, 656 (bottom, 2nd column).

REASONS FOR ALLOWANCE OF WRIT.

I.

Refusal to let petitioners file answer. Discrimination against petitioners and favoritism to respondent, contrary to equal protection clause of Fourteenth Amendment.

Under Indiana law these petitioners had the unqualified right to answer respondent's petition to transfer the case from the Appellate to the Supreme Court of Indiana:

> "TRANSFERS. An application to transfer a cause from the Appellate Court to the Supreme Court may be filed within 20 days after a petition for rehearing has been denied. Proof of *service* of a copy of the application and brief, if any, upon the opposing party or his counsel *shall* be filed with the application. The petition shall set forth:
>
> (a) That a written opinion setting forth the reasons on which such judgment was based was filed by the Appellate Court, giving the date when it was filed;
>
> (b) That the Appellate Court has decided the case, or some material part thereof, against the party who asks that it be transferred;
>
> (c) That the Appellate Court denied a petition for rehearing duly presented by such party within the time allowed, stating on what date it was denied;
>
> (d) Having thus shown the jurisdiction, the petition shall specify without argument in what respect *the opinion of the Appellate Court contravenes a ruling precedent of the Supreme Court or erroneously decides a new question of law, indicating the ruling precedent or concisely stating the new question of law referred to;*

(e) Such petition shall be signed by the petitioner or by his attorney;

(f) If briefs are filed, they shall be separate from and filed with the petition, but they shall not be necessary to invoke the action of the court on the petition. *Parties opposing a transfer may file briefs within 10 days after the filing of the petition to transfer.*"

Rule 2-23 of Indiana Supreme Court (1940 revision).

The above rule is no ordinary court rule to be applied at the pleasure of the court, but it has the effect of a *statute*, having been adopted pursuant to the following authority delegated by the Indiana legislature to the Supreme Court:

"All statutes relating to practice and procedure in any of the courts of this state shall have, and remain in, force and effect only as herein provided. The Supreme Court shall have the power to adopt, amend and rescind *rules of court which shall govern and control practice and procedure in all the courts of this state;* such rules to be promulgated and to take effect under such rules as the Supreme Court shall adopt, and thereafter all laws in conflict therewith shall be of no further force or effect. The purpose of this act is to enable the Supreme Court to simplify and abbreviate the pleadings and proceedings; to expedite the decision of causes; to remedy such abuses and imperfections as may be found to exist in the practice; to abolish all unnecessary forms and technicalities in pleading and practice and to abolish fictions and unnecessary process and proceedings."

Acts 1937, Chapter 91, page 459.

It was extremely urgent and important for these petitioners to have their opportunity to answer respondent's petition to transfer. Such a petition and its contents are jurisdictional, the issue presented by the petition is nar-

row and special, and the task of answering it is a special and rather easy one:

> "This application (to transfer) is jurisdictional and must, therefore, set forth such facts as are necessary to show that petitioner has brought himself within the statute. These facts are * * * (3) that such opinion (of the Appellate Court) contravenes a ruling precedent of this (Supreme) court, or erroneously decides a new question of law, either or both of which objections if desired to be presented must be particularly pointed out * * *.
>
> "An application to remove a case under this statute does not perform the office of an appeal from the Appellate to the Supreme Court, and in considering such applications the *latter court is not required or authorized* by the statute in question *to examine the record in the case* in order to determine whether the ground or grounds stated in the petition or application are sustained. But in deciding this question the court is *limited or confined to the written opinion* of the Appellate Court given in the particular case."
>
> *In re: Aurora Gas, etc. Co.*, 186 Ind. 690, 691, 692; 115 N. E. 673.

Successfully answering the petition to transfer would have resulted in rendering the Appellate Court's judgment final in favor of these petitioners. But when the transfer was granted, the effect was *ipso facto* to vacate and destroy the Appellate Court's judgment and throw open the record for review *de novo* in the Supreme Court on all questions of law and fact. *This destruction of an important and valuable judgment in their favor occurred without an opportunity to answer as to why it should not be destroyed.*

> "When the case was transferred the judgment of the Appellate Court was vacated, and the cause was then pending in the Supreme Court in like manner and to all intents and purposes as though it had been appealed directly to the latter court."
>
> *Kraus* v. *Lehman*, 170 Ind. 408, 422, par. 9, 83 N. E. 714.

Parties discriminated against, such as these petitioners, are not required to demonstrate that they would have won if the discrimination had not occurred. The record does show, nevertheless, that they could have successfully answered the petition to transfer. The subsequent opinion of the Indiana Supreme Court does not point out anything in the Appellate Court's opinion which contravened a ruling precedent or erroneously decided a new question of law or which furnished lawful ground for transfer. The Supreme Court's opinion on the contrary digs into the record and bases itself upon some obscure questions of fact which never would have been before that court except for the unlawful and discriminatory transfer by which it acquired jurisdiction (R. 105-110).

II.

After making the discriminatory transfer to itself, the Indiana Supreme Court proceeded further to discriminate against these petitioners in deciding the merits of the case in the following respects:

A.

The majority opinion decides against these petitioners on the ground that they failed to obtain a statement in the trial court's findings of fact to the effect that there was a failure of consideration for the note on which they were sued. This was a discriminatory requirement for the Indiana Supreme Court to impose on these petitioners, because the Indiana law was and is settled to the effect that such a statement about failure of consideration is a conclusion of law which need not be, and actually should not be, stated in a trial court's findings of fact; and no

such requirement is imposed by the Indiana Supreme Court on other similar Indiana litigants.

Keller v. *Orr,* 106 Ind. 406, 410.
Brush v. *Raney,* 34 Ind. 416, 417.
Lester v. *Hinkle,* 193 Ind. 605, 611 (bottom).

B.

Petitioners nevertheless did comply with the above discriminatory requirement by having in the trial court's findings of fact a clear statement of failure of consideration (Finding No. 8; R. 67-70). The majority opinion then proceeds to deprive petitioners of the benefit of this compliance by premising its decision upon the following palpable misstatement of fact contrary to all the record: "The trial court did not directly or specifically find a failure of consideration" (R. 108). The incorrectness of this statement is apparent without even inspecting the record, because the Chief Justice's dissenting opinion sets forth in full the pertinent finding No. 8, which plainly recites that these petitioners signed the note on which respondent sued them, "*solely* in reliance" upon a specific oral agreement between them and respondent's bank and that "said bank *failed to perform* its part (of the agreement) as aforesaid, and it closed in January, 1932, *without having performed its part.* Neither did its receiver (respondent) ever perform subsequent to closing" (R. 115).

While this Court ordinarily will not review a question of fact, an exception exists when a state supreme court bases its decision on a mis-statement of fact contrary to all the record, particularly when the dissenting opinion sets forth the record showing the mis-statement. It then ceases to be a mere question of fact and becomes a con-

stitutional question of discrimination and denial of due process.

Fisk v. *State of Kansas*, 274 U. S. 380, 385 (bottom); 71 L. Ed. 1104; 47 S. Ct. 655, 656 (bottom) 2nd column.

III.

Such discrimination against petitioners violates the Fourteenth Amendment.

The Appellate Court's judgment in favor of these petitioners was final unless respondent was able to make a specific showing of *issuable* facts and law by a petition to transfer to the Supreme Court. Indiana law specified that these petitioners must be *served* with the petition to transfer and gave them the unqualified right to *oppose* it by an answering brief within ten days (Rule 2-23 under Proposition I, *supra*).

Though these petitioners were served with a copy of respondent's petition to transfer (R. 101), the Supreme Court deprived them of their right to answer it by granting it seven days after it was filed (R. 102), without receiving any answer brief and then denied their request to file an answer without stating any ground and without any fault on their part (R. 102, 105).

This Court holds that the right to answer is so fundamental that it cannot be denied even as punishment for contempt:

Hovey v. *Elliott*, 167 U. S. 409, 414, 417; 42 L. Ed. 215, 220, 221; 17 S. Ct. 841.

And also that refusal to receive an answer is as bad as lack of notice and renders the judgment void:

Windsor v. *McVeigh*, 93 U. S. 274; 23 L. Ed. 914, 916.

12 Am. Jur. Const. Law, secs. 607, 609.

The primary question, however, is not whether Indiana could deny to all her citizens the right to answer such a petition to transfer, but whether her Supreme Court can arbitrarily deny to a *particular litigant* a right which the law actually gives to all. An act of the legislature offends the equal protection clause when it attempts to confer special appellate privileges on one *class* of litigants. It is even worse for a state supreme court to practice favoritism and discrimination against one particular litigant and arbitrarily suspend the law in a particular case.

> "Each party to litigation must have conferred upon him by a statute granting an appeal to this court the same rights and be subject to the same burdens; otherwise the statute which confers the rights or imposes the burdens is special legislation and obnoxious to the Constitution."
>
> *Fenton* v. *Hall*, 235 Ill. 552; 85 N. E. 936, 940.
>
> *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; 22 S. Ct. 431, 439.

> "Equal protection of the laws, in its constitutional sense, implies that all litigants similarly situated may set up matters of defense under like conditions and with like protection and *without discrimination* by the state, by either legislative *or judicial action.*"
>
> 16 C. J. S., Constitutional Law, sec. 561.

Wherefore, petitioners each pray that this Court's Writ of Certiorari may issue to review this case, and for all further just and proper relief in the premises.

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